Supreme Court, U.S.
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No. 99-243

IN THE

Supreme Court of the United States

Scot L. Zimmerman,
Petitioner,

v.

State of Oregon Department of Justice,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

SUPPLEMENTAL BRIEF OF THE PETITIONER

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SUPPLEMENTAL BRIEF OF THE PETITIONER

Petitioner Scot L. Zimmerman respectfully submits this Supplemental Brief in light of this Court's order listing his Petition for Conference together with No. 99-423, *Alsbrook* v. *Maumelle, AK* ("*Alsbrook*").

At least four Petitions for Writs of Certiorari now pending before the Court present the question whether Congress validly abrogated States' sovereign immunity by subjecting them to suit under the Americans With Disabilities Act ("ADA"). In addition to this case and *Alsbrook*, the same issue is presented by No. 98-829, *Florida Department of Corrections* v. *Dickson*, and No. 99-940, *DeBose* v. *Nebraska*.

It is now all but certain that this Court will be required to resolve whether the ADA validly abrogates States' sovereign immunity. Not only does the Eighth Circuit's en banc decision in *Alsbrook* invalidate an important federal statute in several states, but it also "is in direct conflict with the rulings of six other circuits, including three decisions that were rendered subsequent to the Eighth Circuit's ruling and that have expressly rejected that court's holding." Br. of United States, No. 99-423, *Alsbrook* v. *Maumelle, AK* 10. Even if this Court holds in No. 98-796, *United States* v. *Florida Board of Regents*, that Congress did not validly abrogate States' sovereign immunity from suit under the Age Discrimination In Employment Act, it is essentially inconceivable that (a) all six of the circuits that have rejected such a challenge under the ADA would reverse course, *and also* (b) this Court would regard the statute's unconstitutionality as so certain that it would decline to consider the issue at all.

When the Court grants certiorari to address States' sovereign immunity from suit under the ADA, it should do so in this case. Because sovereign immunity is a purely legal issue unrelated to the facts underlying the plaintiff's complaint, the four pending Petitions present equally appropriate vehicles to address the question. *Cf.* No. 98-1828, *Vermont Agency of*

Nat'l Resources v. *United States* (Order of Nov. 19, 1999, directing the parties to address whether private plaintiffs have standing under federal qui tam provisions, notwithstanding that the issue was not raised in the court of appeals). But only *this* Petition presents the opportunity to resolve as well the circuit conflict over whether Title II of the ADA applies to claims of employment discrimination. *See generally* Pet. for Cert. 7-12.

In particular, because sovereign immunity is a jurisdictional issue that must be addressed before any substantive dispute, this Court necessarily would resolve both questions in this case. If the Court holds that the ADA does not validly abrogate States' sovereign immunity, the Court will vacate the judgment below and remand with instructions to dismiss for lack of jurisdiction. The Ninth Circuit's ruling that Title II does not reach employment discrimination, which gave rise to a circuit conflict, would thereby be deprived of precedential force. Alternatively, if this Court rejects the State's assertion of sovereign immunity, it will proceed to determine whether employment discrimination claims may be brought under Title II.

Respectfully submitted,

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